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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1181

ROYAL INSURANCE COMPANY, LTD.,
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

PETITIONER'S REPLY BRIEF.

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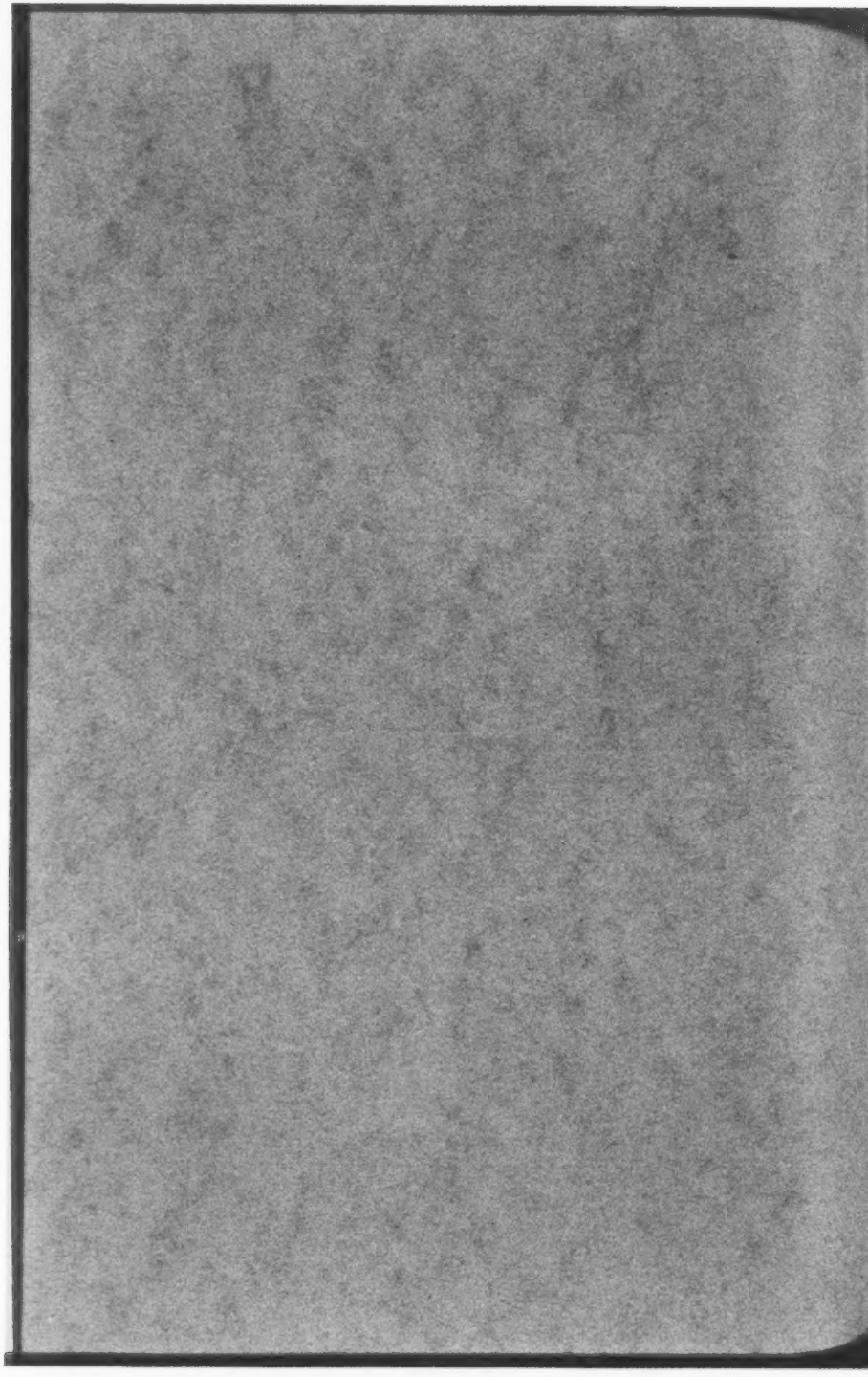

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I.

Respondent argues (pp. 8-10) that "the petition presents no legal basis for certiorari" with regard to the Court of Appeals' construction of the insuring clause of the policy.

(1) He points out (p. 9) that this construction of the policy was established as the law of the case,[1] not

[1]In his brief (p. 3), respondent refers to what he calls "*the obscurely stated and incomprehensible law of the case*". (Italics ours.)

by the last (fourth) opinion of the Court of Appeals, but by its third opinion; and that our petition for certiorari filed following the third opinion was denied. (Of course, the present petition, pp. 1, 4, discloses these matters.)

From this, respondent insists (p. 9) that there is "grave doubt as to whether any question as to the construction of the policy arises *on this record*". (Italics by respondent.)

This precise contention was made, and rejected, in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 US 251, 257-9, 36 SCt 269, 60 LEd 629, 633-4:

> "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the circuit court of appeals on the first appeal, and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the court of appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction . . . by certiorari . . . Except in extraordinary cases, the writ is not issued until final decree . . . The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application[2]. . .
>
> It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the

[2]This was the situation in the case at bar, as is pointed out by the present petition (pp. 1-2).

> decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

See, also, *Burnet v. J. Rogers Flannery & Co.,* 286 US 524, 52 SCt 497, 76 LEd 1268, where certiorari was granted although petitioner's prior application for certiorari to review an earlier judgment of the Court of Appeals on the same point in the same case had been denied (282 US 889, 51 SCt 102, 75 LEd 784).

The two cases cited by respondent are wholly inapposite. In *Tyrrell v. District of Columbia,* 243 US 1, 37 SCt 361, 61 LEd 557, the certiorari granted was dismissed, because it was granted to review a supposedly erroneous instruction given to the jury by the trial Court and it later developed that, as no exception thereto had been taken at the trial, the question involved was not before the Court of Appeals and would not be open for consideration by the Supreme Court. In *Furness, Withy & Co. v. Yang-Tsze Ins. Assn.,* 242 US 430, 37 SCt 141, 61 LEd 409, the certiorari granted was dismissed, because it subsequently appeared that a later final decree in related proceedings was based upon an express compromise agree-

ment which was not disclosed in either the petition or reply.

(2) Respondent argues (pp. 9-10) that, since the question of construction of the contract is controlled by state or local law, "conflict among the circuits is not of itself a reason for granting the writ".

This is true, as was pointed out in *Ruhlin v. N. Y. Life Ins. Co.*, 304 US 202, 206, 58 SCt 860, 82 LEd 1290, 1292, cited by respondent; for the obvious reason that conflict among the circuits is inevitable on such questions under the rule of *Erie R. Co. v. Tompkins*, 304 US 64, 58 SCt 817, 82 LEd 1188, 114 ALR 1487.

However, the petition here is not based on any such ground. The petition points out (pp. 5-7) that the construction of the insuring clause of a leasehold policy involves an important question of local law as yet unsettled by any decision of California Courts or the Courts of any other state; that the decision of the Court of Appeals herein is probably untenable because in conflict with general principles of insurance law, and because in conflict with principles of contract law enunciated by California statutes and by decisions of the highest Court of that State.

That the showing made by the petition constitutes an appropriate basis for issuance of the writ is clear from the opinion in the *Ruhlin* case itself:

> "The Rules [Rule 38(5), Revised Rules of the Supreme Court] indicate that the Court will be persuaded to grant certiorari where a circuit

> court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions'. No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State."

In a footnote (p. 9, n. 8) respondent refers to the well settled California rule that ambiguities in an insurance policy will be construed against the insurer. However, he makes no contention that the portion of the policy construed by the Court of Appeals was, in any respect, ambiguous.[3]

> *National Automobile Ins. Co. v. Industrial Accident Comm.*, 11 Cal. (2d) 689, 81 P2 926, 927:
>
> ". . . Where, as here, the provisions of the policy are definite and certain there is no room for interpretation and the courts will not indulge in a forced construction in order to cast a liability upon the insurer which it has not assumed."

(3) Respondent cites (p. 10) several California cases in support of the Court of Appeals' construction of the terms "lease" and "leasehold" as comprehending a month-to-month tenancy.

None of these cases involved any question of interpretation remotely similar to the problem at bar. Some of them are cited in the opinion of the Court

[3]Nor did the Court of Appeals suggest the presence of any ambiguity.

of Appeals, and are sufficiently discussed in the brief (p. 7) attached to our petition.

The most recent of the cases cited by respondent is *Beckett v. City of Paris etc. Co.*, 14 Cal. (2d) 633, 96 P2 122; the definition there approved by the California Supreme Court is as follows (96 P2, 124):

> "A lease must include a definite description of the property leased and an agreement for rental to be paid at particular times *during a specified term.*" (Italics ours.)

In support of this statement the Court cites *Losson v. Blodgett,* 1 Cal. App. (2d) 13, 36 P2 147, wherein we find this language (36 P2, 149):

> "It will be noted that no term whatever is mentioned in the instrument. A valid lease of real property must set forth, in addition to the parties, a description of the premises, and the rental to be paid, the *term* for which the property is demised . . . Manifestly, the instrument lacks one of the necessary elements of a lease." (Italics by Court.)

It may be seen, therefore, that the California Courts have not failed to recognize the ordinary and popular definition of "lease". Nor does respondent dispute that it is this meaning, and not a technical legal definition, which must control here.

II.

Although respondent categorically asserts (p. 11) that the petition "presents no legal basis for certiorari" with respect to the Court of Appeals' blanket rejection of the trial Court's findings of fact, his argument to the point is so lacking in substance as to amount to an admission that certiorari should be granted.

Respondent does not dispute that the Circuits are in conflict as to the proper interpretation of Rule 52(a) FRCP; or that the scope of review over findings of fact exercised in the case at bar by the Court of Appeals was a departure from the accepted and usual course of judicial proceedings, and out of harmony with the great weight of federal authority. Nor does respondent even attempt to justify rejection of the finding that the insurance company relied on the representation[4] or the finding that respondent did misrepresent his tenure.

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[4]In a footnote to his Statement of the Case (p. 7, n. 5) respondent refers to a stipulation made at the second trial (SR 101). This stipulation was also referred to in the last opinion of the Court of Appeals (R 233, n. 2).

The stipulation was an admission of pleading directed to certain allegations contained in the third amended complaint, on which the second trial was had. This complaint, however, was later superseded (prior to the last trial) by a fourth amended complaint (R 1), from which these allegations were omitted by respondent.

In any event, the stipulation does not fairly admit of the inference attempted to be forced from it. It reads:

> "We also admit that prior to the issuance of said policy, both plaintiff and defendant were in doubt *as to the proper designation* of said interest. . . ."

Bearing in mind that the third amended complaint specifically alleged that when respondent applied for the policy he "fully ad-

Respondent's argument (p. 12) that the finding of falsity of the representation is "clearly erroneous" because "the record on the last appeal (No 9850) contains not one item of evidence . . . addressed to the proof of . . . falsity", is untenable.

As we pointed out (Brief attached to petition, p. 4), the entire record of the second trial was in evidence at the third (last) trial by stipulation of the parties. Prior to the fourth (last) appeal, in order to save expense of printing, it was stipulated that the transcript of record on the third appeal, which contained all of the evidence introduced at the second trial, was to be considered as a part of the record on the fourth appeal (No. 9850) without the necessity of reprinting; this stipulation appears in the transcript of record filed herein (R 227). In preparing the record for certiorari, the clerk of the Court of Appeals inadvertently overlooked the stipulation and forwarded to the Supreme Court only that portion of the record which had been newly printed. As soon as petitioner discovered the error and called it to the attention of the clerk, the latter certified and forwarded the balance of the record to the Supreme Court in the form of a supplemental transcript of record. The supplemental

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vised" petitioner that his predecessor in interest had a written lease not expiring until destruction of the improvements (Brief attached to petition, p. 3), it must be obvious that the stipulation is not an admission of doubt as to *what respondent's interest was*. The doubt, as was clearly stated, was as to *how to designate* the represented interest in the policy. It is not surprising that laymen should have been puzzled as to the appropriate language to describe the unusual tenure which respondent represented that he had. Nor did petitioner make any mistake in concluding that it might properly be described as a "leasehold interest".

transcript is and always was a part of the record on the fourth (last) appeal (No. 9850).

Respondent argues (pp. 12-13) that the finding of falsity was "clearly erroneous" because the evidence as to what tenure respondent in fact had was introduced mostly by respondent rather than by petitioner, and was introduced on the main issue of respondent's right to recover under the policy rather than on the issue raised by the affirmative defense of misrepresentation.

This cannot withstand analysis. The probative effect of evidence does not depend upon whether it is introduced by a plaintiff or a defendant. It is equally clear that factual questions pertinent to each of two or more issues raised by the pleadings do not for that reason justify (much less, require) the introduction of the same evidence more than once. Citation of authority would appear to be superfluous.

Dated, San Francisco, California,
May 18, 1942.

Respectfully submitted,
PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
WILLIAM H. LEVIT,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of May, 1942.

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_____

Attorneys for Respondent.